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237-003—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 570

BENJAMIN COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A1–A17) is reported at 363 F. 2d 321.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1966 (Pet. A18) and a petition for rehearing was denied on August 24, 1966 (Pet. A19). The petition for a writ of certiorari was filed on September 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government improperly deprived petitioner of Rosenbaum's testimony by indicting Rosenbaum for aiding and abetting petitioner.

2. Whether the district court erred in giving some weight—on the issue of whether petitioner paid $30,000 to Rosenbaum in 1960—to circumstantial evidence, such as proof that throughout 1960 Rosenbaum was impecunious and had not paid his debts or his taxes.

3. Whether petitioner is entitled to a further hearing in light of two post-trial developments: (1) The indictment against Rosenbaum has been dismissed, and (2) Rosenbaum's 1960 income tax on the $30,000 which petitioner allegedly gave him in that year has been paid.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 7201.)

STATEMENT

In 1963 petitioner was indicted in the United States District Court for the Southern District of Florida on two counts of wilfully attempting to evade and defeat his income taxes, for the years 1960 and 1961, by filing false and fraudulent returns, in violation of § 7201 of the Internal Revenue Code of 1954. Edward G. Rosenbaum was charged as an aider and

abettor in Count One (1960) and his case was severed from that of petitioner. (R. 8–11, 1284–1287.) Petitioner waived trial by jury and was tried by the court.

The record shows, in summary, that petitioner aided in arranging a $2,350,000 loan from a union pension fund to Samuel Eig, a Maryland real estate developer. In 1960 Eig paid petitioner for these services a fee of $76,000—$16,000 by checks and $60,000 in cash. Petitioner reported $36,000 of this fee on his 1960 income tax return and claims that during 1960 he paid the remaining $40,000 to two of his associates—$10,000 to Tobin and $30,000 to Rosenbaum. After a 14-day bench trial, at which 61 witnesses testified and 144 exhibits were introduced into evidence, the district judge concluded that petitioner did not pay any substantial amount to Rosenbaum during 1960 and that petitioner paid only $5,500 to Tobin during that year. The district court found petitioner guilty on Count One (1960) and not guilty on Count Two (1961), and sentenced him to 18 months' imprisonment and to pay a fine of $10,000 (R. 1317, 1361). The court of appeals affirmed (Pet. A1–A17) and denied rehearing (A19).

The record and findings of the district court (Judge Fulton) with respect to Count One show the following (R. 1302–1315):

In late 1959 Tobin knew that Eig desired to borrow a substantial sum of money. Rosenbaum introduced Tobin to petitioner, who was able to arrange mortgage loans from one of the Teamsters' pension funds.

In early 1960 petitioner arranged a $2,350,000 loan to Eig, and Eig agreed orally to pay petitioner six percent of the amount loaned. Petitioner rejected Eig's offer to put the agreement in writing. During 1960 Eig paid petitioner a total of $76,000—which, at petitioner's request, was paid $60,000 in cash and $16,000 by checks. Petitioner recorded on his books the receipt of only the $16,000 in checks. Petitioner complained to Eig that "a delegation" had been present when petitioner's messenger picked up the first of the two $30,000 cash payments. Later petitioner insisted that Eig destroy a letter his associate had written to petitioner stating that $60,000 cash had been paid petitioner. Petitioner also complained when he was informed that Eig's books showed that $60,000 cash had been paid to him; petitioner stated "This cannot be allowed to stand." At a meeting petitioner suggested that one of Eig's associates declare some of the $60,000 cash payment on his income tax return. (R. 39–45, 56–59, 187–189, 304–307, 367–368, 750–754.)

Later in 1960 petitioner paid $5,500 to Tobin for his services. In March 1961 petitioner paid an additional $4,500 to Tobin and had Tobin sign a back dated receipt stating that he had received the entire $10,000 during 1960. (R. 371–372, 384–387.)

Petitioner testified that he had also paid $30,000 cash to Rosenbaum in 1960. (R. 990–992.) Petitioner introduced into evidence (1) a receipt signed by Rosenbaum stating that he had received this amount during 1960 and (2) Rosenbaum's 1960 income tax return reporting $30,000 as having been

received in that year. (R. 1436–1439, 1479.) Rosenbaum had been indicted along with petitioner as having aided and abetted petitioner's 1960 tax evasion, and had obtained a separate trial. (R. 11, 1284–1285.) Neither the government nor petitioner called Rosenbaum as a witness at petitioner's trial. The government showed, however, that petitioner had known Rosenbaum for many years and had loaned him money from time to time (R. 1040–1041), that Rosenbaum was a frequent impecunious visitor at petitioner's law office (R. 389–393, 781–863, 1040–1041, 1059), that for a number of years, including the tax years set forth in the indictment, Rosenbaum had a substantial unpaid tax liability to the government which remained unsatisfied at the time of trial, notwithstanding collection efforts (R. 680–682, 869–870, 875–876, 1059, 1436, 1473), and that petitioner himself had, at about the time of the alleged $30,000 payment to Rosenbaum, advised Tobin not to lend money to Rosenbaum because he had borrowed money from everyone and was a deadbeat (R. 391–393; Pet. 5).

ARGUMENT

1. Petitioner contends that by indicting Rosenbaum for aiding and abetting petitioner, the government improperly deprived petitioner of Rosenbaum's testimony. If this argument were correct, it would mean that whenever a group of individuals participated in the commission of a crime only one could be indicted. Moreover, even if the government had not indicted Rosenbaum, the latter would still have been justified

in invoking his privilege against self-incrimination if called to testify.[1]

The court of appeals carefully considered this contention and rejected it, stating that (Pet. A16):

> * * * At the beginning of the trial, there was discusison as to whether either the government or the defendant would call Rosenbaum. Neither did. The government is privileged not to call a witness in whom it has no confidence and is under no duty to present evidence for the defense, *Cendella* v. *United States*, 1 Cir., 1955, 224 F. 2d 778, cert. den. 350 U.S. 901; 76 S. Ct. 179; 100 L. Ed 791. True, the government had the burden of proving the falsity of Rosenbaum's receipt but it could choose to undertake it without calling Rosenbaum. The defense could have called Rosenbaum. The choice not to do so was no doubt the product of careful strategy of outstandingly able counsel who represented Cohen. For one thing, it might have been considered best not to submit Rosenbaum to cross examination. It might have been thought, with reason, that one who habitually failed to pay his own taxes would not be a very powerful witness for one under a like accusation. In any event, we think the whole matter dissolves when it is remembered that had Ros-

[1] The cases cited by petitioner (Pet. 10) are not apposite. In those cases the courts held that if the government invoked executive privilege or otherwise refused to produce relevant documents, it could not prosecute the defendants. Here, however, the government has neither refused to produce any relevant documents nor invoked any privilege. Petitioner is not immunized from prosecution because his cohorts have been indicted.

> enbaum been called he could immediately have invoked his constitutional privilege against self-incrimination regardless of whether he was or was not under indictment. At any rate, the defense could not preserve the point, if there is one, by simply assuming unavailability. * * *

Petitioner wrenches the last sentence out of context and presents it as the cornerstone of his argument in the petition for certiorari. It is clear that the court of appeals passed on petitioner's contention and did not rest on the ground that petitioner had waived the point by failing to call Rosenbaum. In any event, the court of appeals was correct in stating that if petitioner wished to preserve the argument, he should have called Rosenbaum as a witness. The cases cited by petitioner (Pet. 11) merely hold that when two defendants are being tried together, one cannot call the other as a witness unless the latter consents.

2. There is no substance in the argument (Pet. 12–13) that the trial judge erred in giving some weight, on the issue of whether Rosenbaum had received the $30,000 from petitioner, to the facts that Rosenbaum was impecunious and had not paid his debts or his taxes. If Rosenbaum had made any payments on these or other obligations or had given any other indication of comparative affluence at or about the time he allegedly received the $30,000 in cash from petitioner, such evidence would plainly have been admissible as tending to bolster petitioner's theory of the case. Conversely, the utter lack of any such payments or signs of affluence was clearly admissible as tending to show that Rosenbaum did not receive the $30,000 or

any substantial part thereof. *United States* v. *Augustine*, 189 F. 2d 587, 590 (C.A. 3).[2]

Moreover, as the trial judge made clear, the "finding that Rosenbaum did not receive $30,000 in 1960, or a substantial portion thereof, is not based solely upon his failure to pay his 1960 taxes; neither is it based solely on the circumstantial evidence tending to show his penurious condition; but is based upon the totality of the evidence in this regard" (R. 1315). Petitioner no longer contends that the facts of record were insufficient to support this finding. As the court of appeals stated (Pet. A9–A10):

> * * * The government's proof established that Rosenbaum really played a very minor role in the business and legal transactions. He arranged an appointment between Tobin and Cohen, and this was his contribution. He had no influence with the Teamsters Pension Fund, attended no more than one meeting with the interested parties, and on one occasion was described by appellant as a "deadbeat, who borrows from everybody he can". It was shown that in 1960, at the time Rosenbaum allegedly received the $30,000 he owed some $35,000 in back taxes, going back to 1951, none of which was paid in 1960 or within three years there-

[2] Petitioner's claim that any proof of Rosenbaum's financial condition constitutes a use of the net worth method in reverse (Pet. 12–13) is manifestly without foundation. Proof that Rosenbaum did not in 1960 act like a man who had just received $30,000 in cash is merely one of the many pieces of "circumstantial evidence" (R. 1315) which the trial judge relied upon in concluding that petitioner had not paid $30,000 to Rosenbaum.

after, despite attempts to collect. He was in debt to many and made no payments on these outstanding obligations. He made no payments on outstanding medical bills amounting to $3,750. A $1,200 judgment against him was uncollectible. The trial judge described Rosenbaum's condition as "penurious".

In addition, the record shows that petitioner went to great pains in an attempt to conceal the fact that he had received $60,000 in cash from Eig in addition to the $16,000 in checks. For example, he entered only the latter amounts on his books, initially refused to enter into a written agreement with Eig, complained bitterly when Eig's associates wrote a letter stating that petitioner had received $60,000 cash, and insisted that Eig's books "cannot be allowed to stand" when told that they reflected the $60,000 cash payment to him. (R. 42, 187–189, 368–369, 750–754.) Clearly, he would not have engaged in this elaborate attempt to conceal the payments if he had not expected to retain most of the cash. The evidence—which the trial judge heard and evaluated—demonstrates that after petitioner's attempts to conceal the receipt of the cash had failed, he shifted to the device of claiming that he had paid much of the cash to Rosenbaum, whose tax bracket was approximately one-half that of petitioner.[3]

3. Equally without merit is the contention (Pet. 13, 14) that petitioner is entitled to either a new trial or a remand to the district court in light of two post-trial

[3] In any event, petitioner no longer disputes that he falsely excluded $4,500 from his 1960 income although he did not actually pay that amount to Tobin until 1961 and that he attempted to conceal this fact by obtaining a back dated receipt from Tobin. (R. 384–387, 1481.)

events (neither of which is in the record) *i.e.*, (a) the dismissal of the indictment against Rosenbaum, and (b) the payment of Rosenbaum's tax on the $30,000.

First, the indictment was dismissed as to Rosenbaum on February 26, 1966, because his health would not permit him to stand trial. That does not mean that Rosenbaum would now be available as a witness, for he could still claim his privilege against self-incrimination.[4] Moreover, even if Rosenbaum testified that he had received the $30,000, nothing would be added to petitioner's case, since the district court recognized that Rosenbaum had always claimed that he received the $30,000. In denying the motion for a new trial, the district court said that Rosenbaum "spoke through his tax return to the Court" (R. 1366) and the fact that he "admitted" receiving the $30,000 is "not anything that the Court was not mindful of and did not take into consideration * * *" (*id*).

Second, shortly before Rosenbaum was scheduled to go on trial on charges of aiding and abetting petitioner in committing the crime of tax evasion, the $10,602 in tax stated as due the United States on Rosenbaum's 1960 return was paid. However, it was certainly to Rosenbaum's advantage to show that his

[4] One of the several possible theories on which Rosenbaum might still be indicted is that he has engaged in a continuing conspiracy with petitioner to evade and defeat the latter's taxes. The latest overt act in that conspiracy was the 1966 payment of $7,602 to the Internal Revenue Service on account of the tax liability stated in Rosenbaum's 1960 return in order to maintain the fiction that he had received the $30,000 from petitioner. Hence the statute of limitations would not bar prosecution until 1972. Internal Revenue Code of 1954, § 6531.

(Rosenbaum's) 1960 tax return was true, *i.e.*, that he really had received the $30,000 from petitioner. Thus, payment of the tax on the $30,000 shortly before Rosenbaum's trial constitutes no more than a reassertion that Rosenbaum had received the money. Conspicuous by its absence is any allegation that Rosenbaum has ever cleared up the back taxes, amounting to about $35,000, which he owes for years prior to 1960 (R. 869–870). Nor did the District Director of Internal Revenue act improperly in accepting $10,602 in payment of Rosenbaum's supposed 1960 tax liability on the $30,000. Since Rosenbaum filed a 1960 tax return stating that he owed $10,602 in income tax and never filed either an amended return or a claim for refund, the District Director was required by § 6201(a)(1) of the Code to assess and collect the tax stated on Rosenbaum's return. Moreover, since petitioner's 1960 tax bracket was substantially higher than Rosenbaum's, the government has (even after payment of Rosenbaum's stated 1960 tax liabilities) collected only $10,602, whereas the asserted deficiency in petitioner's 1960 income tax is $21,283.

The case of *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, relied upon by petitioner (Pet. 14), is inapposite. There the Court remanded for a further hearing because newly discovered evidence (suggesting fraud by the taxpayers) indicated that the facts relied upon by the court of appeals in disposing of the case in favor of the taxpayers were not true. Since the district court hearing might have mooted the ground on which the court of appeals had decided the case (by showing that

the facts relied upon by the court of appeals really did not exist), this Court postponed its review of the case until after the district court hearing. Here, however, the two "new" facts do not in any way impeach either the district court's or court of appeals' decisions (and, in fact, the court of appeals knew of both "new" developments when it decided the case).[5] Since there is no need for further proceedings below, there is no reason for this Court to postpone its review of the instant case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Both developments were pointed out in petitioner's Reply Brief in the court below.

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